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STATE OF WASHINGTON

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DIVISION II OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

CHARLES HAYS and KRISTINA HAYS,

Respondent,

vs.

STATE FARM INSURANCE COMPANY

Appellant.

REPLY BRIEF

Spencer D. Freeman
WSBA #25069

FREEMAN LAW FIRM, INC.
Attorneys for Appellant
1107 ½ Tacoma Avenue South
Tacoma, WA 98402
(253) 383-4500

ORIGINAL

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I. INTRODUCTION AND REVIEW OF MATERIAL FACTS.

State Farm ignores and glosses over key material facts in arguing that it did not act in bad faith or violate the Consumer Protection Act.

From the onset of insuring the Hays' property, State Farm agreed that the actual cash value of the property was \$65,000, and issued a Policy for this amount. CP 184, 253. Nonetheless, after the fire, State Farm inexplicably first valued the property at approximately \$16,000. CP 184, 253.

In response to this shocking valuation, the Hays provided State Farm with a copy of an appraisal, authored at behest of a party desiring to purchase the Hays' property, valuing the property at approximately \$32,000. This report was provided to State Farm as an example as to the ridiculous nature of State Farm's valuation, and not as the Hays' valuation of the property. In fact, the appraisal failed to address upgrades and remodels performed by the Hays, and treated the residence strictly as a mobile home rather than a permanent structure. CP 184, 236.

Regardless of the clear issues with the appraisal report relied upon by State Farm, State Farm alleged that it was the Hays' valuation *and* continued to promote it as the proper valuation for the following two years. State Farm's position was contrary to the Policy it issued and contrary to the claim and valuation presented by the Hays throughout their claim. Instead, State Farm was forced to pay the value of the Hays' claim as the result of an appraisal award, wherein the appraisal panel properly view and valued the property. CP 187, 222-24, 239, 276-78, 292, 322-24.

To make matters worse, State Farm continually delayed the Hays' claim. State Farm refused to explain the reasons why it relied upon a

\$32,000 value for the property, in spite of the Hays' numerous requests for such information and explanation.

The delays caused by State Farm resulted in the issuance of the appraisal award at the end of the Hays' 24 month additional living expenses provided under the Policy. By the time that State Farm issued payment for the true and actual value of the loss, the Hays would no longer receive assistance with a rental property to live in while their home would be rebuilt. CP 188, 239.

The Hays were then responsible for paying both their mortgage on their property *and* rent for a place to live. The Hays could not support both payments, which therefore caused their mortgage company to seize the insurance funds and apply them to the mortgage, leaving the Hays unable to rebuild their home. CP 188, 239-40

It is absolutely clear that if State Farm had properly valued the Hays' loss, the same value that they agreed to upon issuance of the Policy, at the beginning of the claim, the Hays would have been able to rebuild their home without issue or incident. It is equally clear that if State Farm has properly and timely responded to inquiries regarding the claims, including responding to questions about State Farm's claim valuation and requests for a copy of the Policy, the appraisal award could have been issued in such time as to permit the Hays to rebuild their property during the 24 month additional living expense benefits under the Policy.

II. ARGUMENT

A. TRIAL COURT ERRED IN DISMISSING THE HAYS' BAD FAITH CLAIM.

Two important points of law require the determination that the trial court erred in dismissing the Hays' bad faith claims. First, a trial is

absolutely necessary if there is a genuine issue as to any material fact. *Olympic Fish Products, Inc. v. Lloyd*, 93 Wn.2d 596, 611 P.2d 737 (1980); *Jacobsen v. Stay*, 89 Wn.2d 1045 569 P.2d 1152 (1977). Second, the question of whether an insurer acted in bad faith is one of fact. *St. Paul Fire & Marine Inc. Co. v. Onvia, Inc.*, (2008) 2008 WL 5006458.

A bad faith claim against an insurance company can only be granted if there are no disputed material facts pertaining to the reasonableness of the insurance company's conduct. *Indus. Indem. Co. of the NW, Inv. V. Kallevig*, 114 Wn.2d 907, 920, 792 P.2d 520 (1990). Whether an insurance company acted reasonably is an issue of fact.

Contrary to State Farm's assertions and positions, the issue is not simply that the two parties disagreed upon the value of the Hays' claim. The issue runs significantly deeper and more meaningful than that. The issue is whether State Farm was reasonable in the position regarding valuation. They were not.

State Farm has not and cannot present any legitimate or meaningful evidence or argument as to the reason why their valuation of the claim was reasonable. Their only argument is that they sought an outside vendor's assessment.

The problem with the outside vendor's assessment is so clear that to rely upon it was and is unreasonable. Contrary to State Farm's assertions, their "independent" appraisal considered the Hays home only as a manufactured home. Based upon the improvements to the home, the Hays home was not a manufactured home, but had transformed in a permanent residence.

This transformation of the home was reflected in the claim presented by the Hays. State Farm ignored this without reason. This

transformation of the home was also reflected in the Policy issued by State Farm for the home, valuing actual cash value of the home at \$65,000.

State Farm also ignored its own initial valuation of the property.

The issues between the parties are not merely a disagreement of valuation. State Farm went out of its way to ignore specific and important facts pertaining to the valuation of the Hays' home and claim. Such conduct is unreasonable and in bad faith. At a minimum, there is a material issue of fact regarding whether State Farm ignored material facts and evidence in determining its valuation *and* whether such conduct was reasonable.

State Farm further acted in bad faith in the manner in which it responded to specific inquiries. Contrary to State Farm's assertions, State Farm did not provide *adequate and proper* explanation of the \$32,000 claim valuation and payment. Merely stating over and over again that the payment was for actual cash value for the residence and that the Hays' Policy provided for actual cash value fails to answer the questions of *why* State Farm asserted such a valuation. Moreover, State Farm's repeated statements failed to answer the question of why State Farm valued the property at \$65,000 actual cash value when insuring the property but then asserted an actual cash value of less than half that amount when called upon to pay under the Policy.

State Farm's assertion that such inquiries did not start until October 2010 is simply false. The Hays made numerous verbal requests prior to their October 2010 letter to statement. State Farm cannot ignore these inquiries and requests.

The Hays had a right to proper answers regarding questions of State Farm's valuation, and not merely restatements which avoided actual

substantive answers. In fact, even today, State Farm cannot provide a valid meaningful explanation regarding the *significant* difference between its own valuation and that of an independent appraisal panel – which included an appraiser appointed by State Farm.

At a minimum, there are material issues of fact regarding whether State Farm properly and timely responded to inquiries regarding valuation of the Hays' and whether State Farm's actions unreasonably delayed full payment of the Hays' claim until the end of the Policy's 24 month additional living expenses period.

State Farm states that the Hays are responsible for their inability to secure replacement housing by the end of the additional living expense period because the Hays' did not cash the \$32,000 payment for their dwelling claim knowing that cashing the check wouldn't release the claim. While this is nice in theory, the true practical application of cashing the check is meaningless in obtaining replacement housing. The check was *significantly* less than what was necessary to replace the home – such as buying a home of equal value. Without access to the full funds, or the clear promise of access to the full funds, cashing that check would have made no difference to the Hays – it would have left them in the exact same position in securing replacement housing. State Farm's assertions otherwise evidences its failure to understand the true position of its insured.¹

¹ State Farm states that by the spring of 2011, \$60,000 had been paid to the Hays. This assertion is to imply that the Hays had sufficient funds to secure additional housing *before* the appraisal panel issued its award and the award was paid. This is misleading, and further evidences State Farm's unreasonable view of the claim. Of that \$60,000, \$32,000 was issued for the dwelling claim, and the balance for the personal property claim. The monies for the personal property claim were needed to replace the Hays' personal items, including clothing, kitchen items, and furniture to live with. It is unreasonable to assert that these monies were available to secure replacement housing.

State Farm asserts that it conducted a reasonable investigation, which resulted in a dwelling claim valuation of \$32,000. However, the results of this investigation resulted in a valuation that was less than half of what State Farm valued the property when issuing the Policy and from the conclusions of the independent appraisal panel. The key issue that the State Farm, in the claim administration process, insisted on valuing the property based upon a manufactured home, rather than a permanent structure. This position was contrary to the clear evidence, contrary to State Farm the valuation when issue the Policy, and contrary to the conclusion of the appraisal panel. State Farm does not now present any argument to support its position during the administration of the claim, because there is no support.²

B. TRIAL COURT ERRED IN DISMISSING THE HAYS' CONSUMER PROTECTION ACT CLAIMS.

The trial court's error in dismissing the Hays' bad faith claim results in error in dismissing the Hays' Consumer Protection Act claims. An insurance company acting in bad faith violates the Consumer Protection Act. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn.App. 323, 329, 2 P.3d 1029 (2000). Because material issues of fact existed requiring the denial of summary judgment of the Hays' bad faith claims, the trial court should not have dismissed the Hays' Consumer Protection Act claims.

In addition to acting in bad faith, State Farm violated provisions of the Washington Administrative Code ("WAC"), thus violating the Consumer Protection Act.

² Citing to the independent appraisals obtained by State Farm during the claim administration fails to provide such support when the appraisals were for a manufactured home, rather than a permanent structure.

State Farm violated WAC 284-30-370 for failing to conduct its investigations within 30 days. State Farm issued its first payment of \$16,000 without any investigation, apparently. Thereafter, and upon the Hays' objection to the first valuation, State Farm conducted further investigation. State Farm alleges that it was reasonable to take the time to conduct the further investigation. State Farm misses the point. State Farm cannot justify investigations beyond 30 days because its initial investigation is so clearly inadequate. The insurer cannot create the need to extend investigations beyond 30 days.

State Farm violated WAC 284-30-330(2) by failing to act reasonably promptly when communicating with respect to the claim. State Farm's defense to this allegation is to essentially call the Hays liars. The Hays testified to numerous attempts to contact the State Farm adjuster by phone, leaving voice mail messages. State Farm's "detailed chronology" is merely self-serving internal documentation regarding claims. The Hays did not keep such records, as they were not acting with intention of litigation.

State Farm violated WAC 284-30-330(4) by unreasonably relying upon the Country Town appraisal. This appraisal was inadequate not just because of remodel and upgrade issues, but because the appraisal considered the home to be a manufactured home, failing to recognize that it has been transformed into a permanent structure. It was this transformation that significantly altered the valuation of the home – as *specifically* recognized by the appraisal panel, and continually denied by State Farm. The Country Town appraisal was for a manufactured home, not a permanent structure. Therein rest the unreasonableness of reliance upon the appraisal.

State Farm violated WAC 284-30-330(6) by failing to effectuate a prompt, fair, and equitable settlement. State Farm's argument is that the mere existence of two different valuations of a claim does not, by itself, evidence a violation of this regulation. State Farm ignores one important fact – that the basis of State Farm's valuation was unreasonable. State Farm refused to recognize the structure as a permanent structure and continued to value it as a manufactured home. State Farm cannot rely upon an unreasonably incorrect premise and then argue that it attempted to effectuate a prompt, fair and equitable settlement.

State Farm violated WAC 284-30-330(7) by offering to settle the Hays' claim for less than its actual value, thereby forcing the Hays to demand appraisal. State Farm's argument against this assertion is that the Hays' did not demand appraisal and the parties did not engage in an appraisal. This is blatantly untrue. The Hays did, in fact, through their public adjuster demand appraisal, as was evidenced by their public adjusters' declaration, and the actual letter demanding appraisal. State Farm's assertion that appraisal was not demanded is quite disconcerting. The parties thereafter agreed to a modified appraisal process, wherein the sole member of the appraisal panel would be Roger Howson.

State Farm violated WAC 284-30-330(13) by failing to state the reasons that State Farm was valuing their residence as a purely manufactured home rather than as a permanent structure. This was the reason for the disparity of the parties' positions, and the appraisal panel found the home to be akin to a permanent structure, not a manufactured home. State Farm refused to answer this question during the claims administration process, and refuses to provide an explanation even now.

State Farm further alleges that dismissal of the Hays' Consumer Protection Act claims was appropriate because there was no proof of an unfair or deceptive act which could impact the public interest. This assertion, and the ruling by the trial court, is in direct contradiction of the law. In fact, even a single violation of the insurance regulations is sufficient to prove a *per se* unfair or deceptive act or practice which impacts the public interest. *Industrial Indemnity Co. of Northwest, Inc. v. Kallevig*, 114 Wn.2d 907, 923, 792 P.2d 520 (1990).

State Farm alleges that the dismissal of the Hay's Consumer Protection Act claims were appropriate because there was no injury established as a result of the WAC violations. For the purpose of a Consumer Protection act claim, however, the "injury" suffered is distinct from "damages." *Panag v. Farmers Ins. Co. of Wash.* 166 Wn.2d 27, 58, 204 P.3d 885 (2009). "Monetary damages need not be proved; unquantifiable damages may suffice." *Id.* Proof of loss of use of property that is causally related to an unfair or deceptive act or practice is sufficient to prove the fourth element of a Consumer Protection Act violation and thus sufficient to permit recovery of attorneys' fees and costs under the Consumer Protection Act. *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 792 P.2d 142 (1990), *cited with approval in Panag*, 166 Wn.2d at 58.

The Hays were without the use of their property for years as a result of the bad faith actions of State Farm, and its violation of the insurance regulations. While State Farm ultimately paid the appraisal award in early 2012 – nearly two years after the fire, it was too late for the Hays. Their additional living expenses were to be terminated and they could not rebuild their home in time. This caused the Hays to be responsible for rent *and* their mortgage. Not being able to accommodate

both, their mortgage company took the insurance funds to pay towards the outstanding mortgage fees and balance against the mortgage. As a result, as of the date of the court's summary judgment ruling, the Hays still had not been able to rebuild their property and were continuing to live in a rental home.³

At a minimum, there are genuine issues of material fact pertaining to the Hays' Consumer Protection Act claims. There are material issue of fact regarding State Farm's bad faith conduct, their violations of insurance regulations, and injury suffered by the Hays as a result of State Farm's conduct.

C. ATTORNEY FEES

The Hays' failure to requests its attorneys fees in its opening brief was not an oversight. The Hays' have made claims for attorneys' fees as a part of their bad faith and consumer protection act claims. However, these fees are only awarded upon award of a favorable judgment for these claims. Prevailing on this appeal would result in the claims being remanded to the trial court for trial. Any request for attorneys' fees will only be available upon success at trial, awarded by the trial court.

III. CONCLUSION

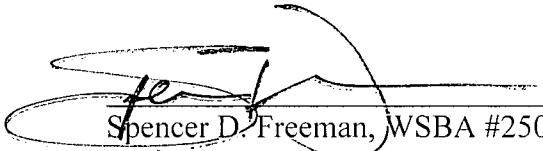
There are material issues of fact regarding the Hays' bad faith and Consumer Protection Act claims. There is a material issue of fact as to whether State Farm acted reasonably in relying upon a Town and Country Appraisal which treated the Hays home as a strict manufactured home,

³ State Farm correctly points out that the Hays' appeal brief cites incorrect facts, the unfortunate result of a drafting error. However, counsel's error in this regard does not change the facts on record regarding the Hays loss of use of the property and loss of ability to rebuild their home in the more than years after the fire.

rather than as modified to a permanent structure – a fact that was material to the appraisal award. There are material issues of fact as to whether State Farm’s conduct unreasonably delayed the claim process, such that the claim was not paid in full until a time that the Hays’ additional living expense benefits were terminated, thus binding the Hays’ financially, prohibiting them from being able to rebuild their home.

Accordingly, the trial court erred in granting summary judgment and dismissing the Hays bad faith claims and Consumer Protection Act claims.

DATED this 18th day of May, 2015



Spencer D. Freeman, WSBA #25069
Attorney for Appellants